of voices in a media market, and to address antitrust considerations. Ten years later, however, the Commission acknowledged that diversity had been achieved in virtually every market, and that restrictions on freedom of expression can no longer be justified by reference to such a goal.[51] And, except in a handful of the smallest markets where antitrust considerations may warrant some restrictions on media ownership, such diversity guarantees an absence of monopolization of the means of expression in a given market.[52] Since the validity of the rule no longer exists, that rule cannot withstand constitutional scrutiny.[53]

41. Further, it would appear that continued enforcement of the NBCO Policy is counterproductive to the stated goals of "diversity." The print media has taken a disturbing downturn since the adoption of the Policy. In an attempt to keep daily newspapers viable, Congress enacted the NEWSPAPER PRESERVATION ACT.[54] The Act exempted newspaper joint operating agreements from the application of the federal antitrust laws, if, at the time of the arrangement, not more than one of the newspaper publications involved in the performance of such an arrangement was likely to remain or become a financially sound publication.[55]

42. Continued enforcement of the NBCO Policy is thus in conflict not only with the Commission's policy of diversity but the public policy expressed by

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[51]See eg., *Syracuse Peace Council, supra.*

[52]Moreover, a total ban on newspaper-broadcast cross-ownership is hopelessly and constitutionally overbroad as a means of serving any valid governmental interest in anticompetitive activity.

[53]*See, Geller v. FCC, supra; Home Box Office v. FCC, supra.*

[54]PUBLIC LAW 91-353, 15 U.S.C. §1801.

[55]*See* 15 U.S.C. §§1801-1803.

Congress in the implementation of the NEWSPAPER PRESERVATION ACT as well.[56] FOE respectfully submits that continued enforcement of a policy which tends to reduce diversity and effective competition is directly and fundamentally contrary to the public interest.

43. The elimination of the NBCO Policy would enhance broadcast program service. In its initial Rule Making adopting the NBCO Policy, the Commission acknowledged that stability of the industry and continuity of ownership served important public interest purposes because they encouraged commitment to program quality and service.[57] That co-located newspaper-television combinations had provided "undramatic but nonetheless statistically significant superior" program service in a number of program particulars was too clear in the record to be denied by the Commission.[58]

44. The Commission has also recognized in other contexts that the amount of available capital has a significant relationship to the quality of program service provided. Although one might argue that the acquisition of a troubled newspaper by a television broadcast licensee (or *vice versa*) would necessarily diminish the capital available to the broadcaster, the opposite is true. Greater economies of scale through a greater revenue base and considerations of space,

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[56]That Congress apparently acted itself in conflict with the Act, by prohibiting the FCC from conducting Rule Making proceedings to repeal the NBCO Policy, is explained by the political motivations of the Congressional Leaders at the time. As found by the U.S. Court of Appeals, which overturned a portion of that legislation, debate on the floor clearly indicated that the legislation was directed at a single individual, Rupert Murdoch, owner of Fox Broadcasting and, at that time, daily newspapers in both Boston and New York, which newspapers at times were extremely critical of certain U.S. Senators. Based upon the remarks of some senators during the debate, it was clear that the rider was retaliatory in nature, and an attempt to suppress free speech. *See, NewsAmerica Publishing, Inc. v. FCC*, 844 F.2d 800 (D.C. Cir. 1988).

[57]*See, Newspaper Broadcast Cross Ownership Policy*, 50 FCC 2d 1046, 32 RR 2d 954, 1032 (1975).

[58]*Id.*

consolidation, and accounting would yield additional financial resources made available for both programming and newspaper circulation without jeopardizing editorial independence. Accordingly the elimination of the Newspaper-Broadcast Cross Ownership Policy would serve to enhance broadcast service and have the added public interest benefit of providing additional economic stability to the print media.

45. FOE acknowledges that the Commission is presently prohibited by Congressional appropriation legislation from completely repealing the NBCO rule. FOE respectfully submits, however, that it is both permissible and appropriate for the Commission to *declare* in the Report and Order to be issued in this proceeding, that, as a matter of policy, the NBCO rule is counterproductive to the goals of media competition and diversity, that it is an unjustified restraint on the freedom of expression not supported by any compelling governmental interest, and accordingly, no longer serves the public interest, convenience and necessity. The Commission should also urge Congress to repeal the present legislation inhibiting Commission action.

E. Continued Enforcement of the Multiple Ownership and Cross-Ownership Rules as Applied to Broadcast Television is Inconsistent With the First Amendment

46. The ownership regulations that television broadcasters must observe were put in place to maximize outlets for local expression and ensure diversification of programming. Unfortunately, the regulations no longer effectuate these policies. Eliminating the stringent ownership rules would allow broadcasters to compete more effectively, thereby ensuring quality and diversity in programming for the public. The ownership rules not only stifle productivity, but also infringe upon broadcasters' First Amendment rights: television broadcasters are prevented

from freely selecting the media to present their programming to the public, and are also denied the ability to bargain for better programming. The structural limitations placed on broadcasters thus eliminate from particular markets and the public major providers of information.

47. To be constitutional, governmental regulations which favor certain classes of speakers over others must be supported with a compelling state interest.[59] In *Turner Broadcasting Systems, Inc. v. FCC*, 114 S. Ct. 2445, 2468, 75 RR 2d 609 (1994), the Court reaffirmed that "[r]egulations that discriminate among media, or among different speakers within a single medium, often present serious First Amendment concerns." Regulation which restricts the speech of some elements of society in order to enhance the relative voice of others is presumed invalid. *Buckley v. Valeo*, 424 U.S. 1 (1976). Such discrimination constitutes an indication that the rule's purpose is to regulate the message provided by certain speakers, and is highly suspect. The fact that the restrictions may operate against only a small group of speakers is irrelevant.[60] The scarcity and diversity rationales do not adequately justify such rules in light of the enormous amount of video programming and information available to consumers. From a First Amendment perspective, broadcast television can hardly be considered unique when compared to other mass media video information sources. The First Amendment would be better served by placing broadcasters on equal footing with other video providers. In short, "[T]he public interest in diverse video options is best served by deferring to the marketplace."[61]

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[59]*Home Box Office*, 567 F.2d at 47-48 (D.C. Cir. 1977).

[60]*C&P Telephone*, 76 RR 2d at 995.

[61]*Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (1985).

48. Moreover, it has long been held that regulations that impose First Amendment burdens on speech must be closely tailored to further an important government interest.[62] If diversity is the interest served by the ownership rules, then the regulations are overinclusive. One has only to look at the diversity of programming and sources in most major markets to realize that these concerns are overstated.

49. For the reasons advanced above, the continued enforcement of the multiple ownership numerical limitations, the duopoly rule, the one-to-a-market rule, and the newspaper-broadcast cross-ownership rule no longer serve the public interest and raise serious questions of consistency with First Amendment principles. It is clear that, absent a sufficiently important and continuing compelling governmental interest, regulations which either directly abridge freedom of expression or, by their application restrict such expression, are constitutionally suspect. *United States v. O'Brien, supra.*

50. There can be no dispute over whether either the numerical ownership limitations or the duopoly restrictions impinge upon the broadcaster's First Amendment rights. Although the regulation professes to be content neutral, restricting only ownership of broadcast facilities, and not the content of their expression, those regulations discriminate among speakers in the video programming market, based on the nature of the medium used for speech, and are thus highly suspect. It necessarily follows that restrictions on ownership impinge directly on freedom of expression by determining who may speak and who may not. The rules dictate where a broadcaster may exercise his freedom of expression, which is contrary to the well established principle that government may not condition the receipt of a public benefit on the relinquishment of a constitutional right —

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[62] *United States v. O'Brien*, 391 U.S. at 377 (1968).

especially the right to freedom of expression. *Perry v. Sinderman*, 408 U.S. 593, 597 (1972); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963); *Shapiro v. Thompson*, 394 U.S. 618 (1968).[63] Moreover, given the current availability of programming and other information sources, it cannot be concluded that the present multiple ownership rules are sufficiently narrowly tailored to meet the standards set forth in *United States v. O'Brien, supra*. Certain broadcasters are denied the right to acquire additional broadcast licenses solely because the government is trying to promote goals that have already been achieved — diversity of opinion and market-place competition.

51. A government regulation which restricts or otherwise has an adverse impact on an individual's or group's freedom of expression is justified only to the extent that (a) it furthers an important or substantial governmental interest (*i.e.*, one that addresses an evil that the government has the right to prevent), (b) is unrelated to the suppression of content of speech, or (c) the incidental restriction upon freedom of expression caused by enforcement of the regulation is no greater than necessary to achieve that interest. *United States v. O'Brien, supra.*

52. The two primary reasons why the FCC adopted numerical ownership restrictions and the duopoly and one-to-a-market rules were to further the policy of promoting diversity of viewpoints in media markets, and prevent monopolistic practices within the broadcast industry. Both goals were in turn based upon the scarcity rationale, and the need to ensure that all markets were provided with a

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[63]See also, *Buckley v. Valeo*, 424 U.S. 1 (1974), wherein the Court held that forced choices in the Federal Election Campaign Act which limited expenditures of individuals or groups supporting a candidate were held to be an unconstitutional abridgment of freedom of speech. In striking down that part of the legislation, the Court rejected the notion that Government, under the Constitution, could act to equalize the relative ability of individuals and groups to influence the outcome of elections. Rather, "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment..." 424 U.S., at 48-49.

sufficient diversity of viewpoints. Under the circumstances existing when the rules were first promulgated, the rules were justified under the *O'Brien* test set forth above.[64] However, given the fact that the Commission has officially proclaimed that the goal of diversity has been achieved in virtually all media markets, it must follow that restrictions on freedom of expression can no longer be justified by reference to such a goal. It has been observed that scarcity is an inappropriate basis for broadcast regulation of First Amendment speech.[65] Even assuming that scarcity should serve as a standard for government oversight, it is well established that the scarcity rationale no longer exists. The Commission has, on numerous occasions, emphasized that there is a sufficient increase in the number and diversity of program outlets to warrant a variety of deregulatory actions.[66] Except for a handful of the smallest markets where antitrust considerations may warrant some scrutiny of media ownership, such diversity guarantees an absence of mono-

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[64]*See also, Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969); *Mt. Mansfield Television v. FCC*, 442 F.2d 470, 21 RR 2d 2087 (2d Cir. 1971).

[65]In *Telecommunications Research and Action Center v. FCC*, 801 F.2d 501, 61 RR 2d, 330, *reh. denied*, 806 F.2d 1115 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 919 (1987), the court noted that use of the scarcity rationale as an analytic tool in connection with new technologies inevitably leads to strained reasoning and artificial results.

> "It is certainly true that broadcast frequencies are scarce but it is unclear why that fact justifies content regulation of broadcasting in a way that would be intolerable if applied to the editorial process of the print media. All economic goods are scarce . . . Since scarcity is a universal fact, it can hardly explain regulation in one context and not another. The attempt to use a universal fact as a distinguishing principle necessarily leads to analytical confusion." (*footnotes omitted*)

61 RR 2d at 337.

[66]*See, e.g., Multiple Ownership of AM, FM and Television Broadcast Stations*, 100 FCC 2d 17 (1984), *recon.*, 100 FCC 2d 74 (1985) (revising the seven-station rule to permit ownership of up to twelve stations); *Fairness Doctrine Alternatives*, 2 FCC Rcd 5272 (1987), *recon.*, 3 FCC Rcd 2035 (1988), *aff'd. Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989) (eliminating the fairness doctrine as unnecessary because of the diversity of voices and opinion in broadcast and other media).

polization of the means of expression in a given media market. Whatever validity the current numerical ownership restrictions or the duopoly or one-to-a-market rules may once have had, it no longer exists.

53. Where the underlying public interest consideration for a regulation is no longer valid, the rule cannot withstand constitutional scrutiny. *See, Geller v. FCC*, 610 F.2d 973, 980 (D.C. Cir. 1979) ("Even a statute depending for its validity upon a premise extant at the time of enactment may become invalid if subsequently that predicate disappears."); *Home Box Office v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 829 (1977) ("[R]egulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist." [citations omitted]). Accordingly, FOE submits that the numerical limitation, duopoly, one-to-a-market and newspaper-broadcast cross-ownership rules that presently restrict ownership of television stations be eliminated, in the case of the numerical restrictions, one-to-a-market and newspaper-broadcast cross-ownership rules, and substantially relaxed in the case of the duopoly rule.

CONCLUSION

54. Two major conclusions emerge from the above analysis. First, that the television broadcast industry is at an extreme competitive disadvantage *vis-a-vis* other providers of video program services, and that the disadvantage is largely a result of the Commission's own policies which restrict the ownership of television broadcast media while imposing no similar restrictions on multichannel video program providers. Second, the current statutory and regulatory restrictions on ownership of television broadcast stations have a significant and direct adverse impact upon television licensees' freedom of speech under the First Amendment,

for which there no longer exists any significant or important governmental interest. Given the severe danger to the continuing economic health of the television industry, and the more significant ongoing infringement of First Amendment rights, FOE believes the Commission should take immediate steps to rectify the situation.

WHEREFORE, the above premises considered, FOE respectfully urges that the Commission amend its Rules to eliminate the numerical limitation on ownership of television stations nationally, and at a minimum, substantially relax the "audience reach" restriction to allow for a greater audience reach, consistent only with antitrust considerations; eliminate the one-to-a-market rule; eliminate the newspaper-broadcast cross-ownership rule; and substantially relax the duopoly rule such that it is consistent with the duopoly restrictions presently imposed on other broadcast media.

Respectfully submitted,

FREEDOM OF EXPRESSION FOUNDATION, INC.

By: 
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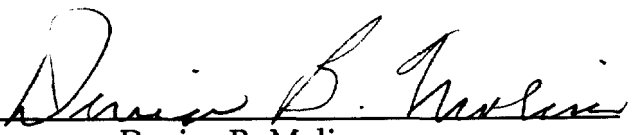
By: 
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May 17, 1995

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